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No. 91-1125

In the Supreme Court of the United States

OCTOBER TERM, 1991

GARLAND ARNOLDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's designation of a United States magistrate to preside over the return of the jury's verdict violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution.

2. Whether petitioner's prosecution for racketeering offenses violated the Double Jeopardy Clause because some of the predicate acts of racketeering involved criminal conduct for which petitioner had previously been convicted.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 947 F.2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1991. The petition for a writ of certiorari was filed on January 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After two jury trials on a severed indictment in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846; three counts of cocaine distribution, in violation of 21 U.S.C. 841(a)(1); one count of possession of ammunition by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1); and one count of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 98 months' imprisonment, to be followed by five years of supervised release, and fined $5,000.

After a third trial on a separate indictment in the Southern District of West Virginia, petitioner was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); four counts of drug distribution, in violation of 21 U.S.C. 841(a)(1); and eight counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to 292 months' imprisonment, to be followed by five years of supervised release.

On a consolidated appeal, the court of appeals affirmed all the convictions, but vacated the sentences and remanded for resentencing. Pet. App. 1a-16a.

1. The evidence showed that in 1981 and 1982, petitioner distributed quaaludes, LSD, and marijuana that he had obtained from Kenneth McMillion, a member of the Pagan Motorcycle Club. Petitioner became a member of the Pagans in September 1985, after he had been arrested for a transaction involving 100 pounds of

marijuana and had refused to cooperate with the authorities in the ensuing investigation. Gov't C.A. Br. 7.

During petitioner's membership in the Pagans, McMillion distributed LSD to petitioner for resale in quantities of 500 to 1,000 "hits," or doses. Petitioner also participated in a variety of transactions involving marijuana, cocaine, and PCP. Petitioner made trips to Florida and Detroit to obtain cocaine that was brought back to West Virginia and sold. Gov't C.A. Br. 8.

On three occasions in April and May 1988, petitioner sold cocaine to government informant Glen "Banty" Clay. In June 1988, petitioner traveled to Ohio to obtain cocaine, which eventually was brought to West Virginia. That same month, petitioner became president of the newly formed Kentucky chapter of the Pagans. Gov't C.A. Br. 8-9.

On June 22, 1988, petitioner met Clay for the purpose of obtaining payment for their previous cocaine transaction. Following the payment, petitioner was arrested. A search of the van petitioner was driving at the time of his arrest uncovered two firearms and drug paraphernalia. Gov't C.A. Br. 9.

2. On August 2, 1988, petitioner was named in an eight-count indictment in the Southern District of West Virginia. After he successfully moved to sever the charges, he faced two trials on that indictment. In the first trial, held on November 7-9, 1988, petitioner was tried for conspiring to distribute cocaine, in violation of 21 U.S.C. 846 (Count 1); distributing cocaine in March 1988 (Count 2), on April 18, 1988 (Count 3), on May 4, 1988 (Count 4), and on May 16, 1988 (Count 5), all in violation of 21 U.S.C. 841(a)(1); and carrying and using a firearm in relation to the commission of a drug trafficking offense on June 22, 1988 (Count 8), in violation of 18 U.S.C. 924(c)(1).

Following closing argument and the charge to the jury at petitioner's first trial, the district court announced that it intended to delegate to a magistrate the responsibility for presiding over the return of the jury's verdict. Petitioner did not object to that delegation. The jury then found petitioner guilty on Counts 1, 3, 4, and 5, and not guilty on Counts 2 and 8. The magistrate received the verdict, polled the jury, and remanded petitioner to custody. Pet. App. 3a.

Subsequently, petitioner was tried on December 6-7, 1988, for possession of ammunition by a convicted felon on June 22, 1988 (Count 6) and possession of firearms by a convicted felon on June 22, 1988 (Count 7). He was convicted on both counts and sentenced on Counts 1, 3, 4, 5, 6, and 7 to a total of 98 months' imprisonment, to be followed by five years' supervised release, and a $5,000 fine.

3. Petitioner was indicted again in the Southern District of West Virginia on January 10, 1989. He was named in 14 counts of an 85-count indictment. Count 1 charged him with participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). Count 2 charged him with conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). Counts 5, 6, 8, 9, 11, 12, 67, and 69 charged him with interstate travel in aid of racketeering in April 1986, in June 1986, and on June 12, 1988, in violation of 18 U.S.C. 1952(a)(3). Counts 7, 10, 13, and 71 charged him with possession of cocaine with intent to distribute it in April 1986, in June 1986, and on June 13, 1988, in violation of 21 U.S.C. 841(a)(1). He was convicted on all counts and sentenced to a total of 292

months' imprisonment, to be followed by five years of supervised release. His sentence was set to run concurrently with the sentence imposed on his earlier convictions.

4. On appeal, petitioner contended that the district court's designation of a magistrate to preside over the return of the jury's verdict at his first trial violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution. The court of appeals observed that, although the Federal Magistrates Act does not explicitly authorize a magistrate to preside over the return of a jury verdict, it contains a residual provision, 28 U.S.C. 636(b)(3), authorizing the designation of a magistrate to perform "such additional duties as are not inconsistent with the Constitution and the laws of the United States." Pet. App. 5a-6a. Relying on *Peretz* v. *United States*, 111 S. Ct. 2661 (1991), the court then held that petitioner waived his constitutional claim by failing to object to the delegation. Pet. App. 6a-7a. The court also rejected petitioner's statutory claim, noting that the legislative history of the Act indicates that the "additional duties" clause permits a magistrate to accept return of a jury verdict where the trial judge is unavailable. *Id.* at 7a.

Relying on *Grady* v. *Corbin*, 495 U.S. 508 (1990), petitioner also contended that the Double Jeopardy Clause barred his RICO prosecution because the RICO counts in his second indictment included as predicate acts the three cocaine distribution offenses and the conspiracy to distribute cocaine for which he had been convicted at his first trial. The court of appeals observed that in *Garrett* v. *United States*, 471 U.S. 773 (1985), the

Supreme Court had rejected a similar claim in the context of a prosecution for engaging in a continuing criminal enterprise under 21 U.S.C. 848. Pet. App. 11a. The court then concluded that "the principles enunciated in *Grady* govern the paradigmatic 'single course of conduct' case, but that prosecutions under statutes such as RICO and CCE—statutes targeted at 'multilayered' instances of criminal conduct invariably occurring at different places and times—call for a calculus reflecting the concerns expressed in *Garrett*." *Id.* at 13a. Noting that the most recent predicate acts alleged in the RICO indictment were not discovered until after the return of the initial indictment, the court added that the government should not be required to choose between "proceed[ing] against a defendant for violations that might later serve as predicate acts and foreclos[ing] a RICO prosecution in the future [and] allow[ing] predicate acts to go unpunished in anticipation that at some future time the RICO elements would coalesce." *Id.* at 14a.

ARGUMENT

1. Petitioner renews his contention (Pet. 3-20) that the district court's designation of a United States magistrate to preside over the return of the jury's verdict violated the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, and Article III of the Constitution. The court of appeals correctly rejected that claim.

a. As petitioner contends, in enumerating some of the duties that may be performed by a magistrate, the Federal Magistrates Act does not mention acceptance of a jury verdict in a felony case. 28 U.S.C. 636(b). The Act does provide, however, that "[a] magistrate may be

assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28U.S.C. 636(b)(3). The legislative history of the Act explicitly states that the "additional duties" clause "would permit * * * a magistrate to * * * accept returns of jury verdicts where the trial judge is unavailable." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976). In light of that clear congressional command, the district court did not err in permitting the magistrate to receive the verdict. The only other court of appeals to address the issue has reached the same conclusion. *United States* v. *Day*, 789 F.2d 1217, 1224 (6th Cir. 1986).

Petitioner argues (Pet. 8-9) that allowing a magistrate to accept a jury verdict is inconsistent with Fed. R. Crim. P. 25, which provides that, although a trial judge may be replaced with another judge for reason of absence after the return of the verdict, he may be replaced during trial only for reason of death, sickness, or other disability. However, Rule 25 does not address the reasons for which a trial judge may designate a magistrate. Unlike a replacement judge, who obtains complete authority over a case once he is appointed and whose conduct of the case is unreviewable by the original judge, a magistrate serves under the trial judge's "total control and jurisdiction," and his actions are subject to the trial judge's review. *Peretz* v. *United States*, 111 S. Ct. 2661, 2670 (1991). Accordingly, Rule 25 addresses a situation—the total replacement of the trial judge—that is remote from the designation of a magistrate to perform a specified duty under the trial judge's supervision.[1]

[1] In *Day*, the Sixth Circuit rejected the same Rule 25 argument advanced by petitioner here. See 789 F.2d at 1224.

Petitioner's reliance on *Government of the Virgin Islands* v. *Paniagua*, 922 F.2d 178 (3d Cir. 1990), is misplaced. In that case, the magistrate performed such functions as responding to a jury note, giving a supplemental jury instruction, and declaring a mistrial—substantive trial duties that differ substantially from the essentially administrative function of receiving a verdict. In expressing "serious reservations" about a magistrate's authority to declare a mistrial, the court stated that it did "not understand how [that] procedure * * * can be reconciled with Fed. R. Crim. P. 25." 922 F.2d at 183. The court's decision, however, did not turn on any argument based on Rule 25, since the court went on to affirm the defendant's conviction based on the defendant's acquiescence in the magistrate's action. *Id.* at 183. Likewise here, petitioner acquiesced in the magistrate's acceptance of the verdict by failing to make an objection. That fact provides an independent basis for rejecting petitioner's statutory claim. See *Peretz*, 111 S. Ct. at 2671 (holding that supervision of *voir dire* is an additional duty that may be delegated to a magistrate under the Act "when the defendant raises no objection").

b. Petitioner's failure to object also defeats his constitutional claim. In *Peretz*, the Court held that, in light of the fact that the most basic rights of criminal defendants are subject to waiver, a defendant may waive his right to have an Article III judge preside during jury selection. The right to have an Article III judge receive the verdict—a far more ministerial task than jury selection—is equally subject to waiver.

Petitioner attempts (Pet. 10) to distinguish *Peretz* on the ground that *voir dire* occurs early enough in the proceedings to make abortion of the trial practical if the

magistrate's performance is deficient, while "[t]hat is hardly the case at the verdict stage, when it may realistically be expected that the [trial] judge would cause the entire trial to be redone only in the face of the most egregious error by the magistrate." But in this case, petitioner did not ask the trial judge to review any action by the magistrate. See *Peretz*, 111 S. Ct. at 2665. Furthermore, if the magistrate had erred in a manner that affected the defendant's substantial rights, it would have been the judge's duty to correct that error by holding a new trial. "To suppose that the trial judge would be dissuaded from carrying out that duty by the public expense of a new trial is to ignore the constitutionally preserved independence of Article III judges." *United States* v. *Saunders*, 641 F.2d 659, 664 (9th Cir. 1980), cert. denied, 452 U.S. 918 (1981).

2. Petitioner also contends (Pet. 20-23) that the RICO counts were barred by the Double Jeopardy Clause because they alleged as predicate acts conduct for which petitioner had previously been convicted.

a. In *Garrett* v. *United States*, 471 U.S. 773 (1985), this Court held that the Double Jeopardy Clause did not bar the use of a drug importation offense for which the defendant had previously been prosecuted as a predicate offense in a CCE prosecution. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, 471 U.S. at 779-786, the Court went on to express "serious doubts" that the predicate drug violations were lesser included offenses within CCE, *id.* at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and to place, involved in

this case." *Id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses." *Id.* at 786. Nevertheless, assuming *arguendo* that CCE and its predicate offenses are the same offense, the Court concluded that the successive prosecutions did not violate the Double Jeopardy Clause because the CCE offense continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

b. Applying the analysis of *Garrett*, petitioner's successive prosecutions did not violate the Double Jeopardy Clause. Just as Congress intended to permit successive prosecutions for CCE and its predicate drug offenses, so it intended to permit successive prosecutions for RICO and its predicate acts of racketeering. Under RICO, the last alleged predicate act of racketeering must occur within 10 years after the commission of the prior predicate act "excluding any period of imprisonment." 18 U.S.C. 1961(5). That language suggests that Congress envisioned the situation in which a defendant is convicted and sentenced for a racketeering act and later charged with a RICO violation based in part on the prior conviction. See *United States* v. *Grayson*, 795 F.2d 278, 282 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987). Further, in enacting RICO, Congress declared in its Statement of Findings and Purpose that it intended to establish "new penal prohibitions" and "enhanced sanctions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. Barring the use in RICO prosecutions of predicate offenses for which the defendant previously has been convicted "would

nullify the intent and effect of the RICO prohibitions." *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

In addition, like the CCE offense considered in *Garrett*, a RICO violation is not the "same offense" for double jeopardy purposes as any of its predicate acts. Like a CCE charge, a RICO charge requires proof of multiple criminal acts occurring over an extended period of time and an ongoing criminal association often involving a large group of individuals. RICO expresses these requirements by means of its prohibition against conducting an "enterprise" through "a pattern of racketeering activity"; the pattern in question requires proof of at least two related predicate acts that amount to, or pose a threat of, continuing criminal conduct. 18 U.S.C.1962(c); see *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Because of the complex nature and scale of activity targeted by RICO, the criminal threat posed by a RICO violation is not equivalent in any meaningful sense to the discrete underlying predicate crimes.

In light of *Garrett*, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar the use of an offense for which the defendant has already been prosecuted as a predicate act of racketeering in a RICO case. *E.g.*, *United States* v. *O'Connor*, No. 90-3105 (7th Cir. Jan. 28, 1992); *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir.), cert. denied, 112 S. Ct. 178 (1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir.), cert. denied, 112 S. Ct. 54 (1991), and petition for cert. pending, No. 91-31; *United States* v. *Pungitore*, 910 F.2d 1084, 1108-1111

(3d Cir. 1990), cert. denied, 111 S. Ct. 2009 (1991); *United States* v. *Licavoli*, 725 F.2d 1040, 1049-1050 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1980), cert. denied, 459 U.S. 1206 (1983).

c. Quite apart from the difference for double jeopardy purposes between RICO and its predicate crimes, petitioner's successive prosecutions were permissible under *Garrett* because, according to the indictment, the RICO offenses continued to January 1989—past the date of petitioner's earlier indictment on August 2, 1988. Although the RICO counts do not specify any act personally committed by petitioner after the return of the earlier indictment, they do allege such acts by petitioner's co-conspirators. Count 1 ¶¶ 27(e), 36(c), 37(b). Under *Garrett*, the government was not required to prosecute in August 1988 RICO offenses that continued after that date. 471 U.S. at 791-793. Furthermore, the most recent predicate act alleged against petitioner was not discovered until after the date of the first indictment. Pet. App. 14a. See *Brown* v. *Ohio*, 432 U.S. 161, 169 n. 7 (1977) (Double Jeopardy Clause does not bar successive prosecution "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence").

d. In support of his double jeopardy claim, petitioner invokes *Grady* v. *Corbin*, 495 U.S. 508, 510 (1990), in which the Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution,

the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, however, does not help petitioner.

First, *Grady* does not apply to RICO prosecutions. In *Grady*, the successive prosecutions involved simple offenses—misdemeanor traffic violations and homicide—that occurred simultaneously during a single course of conduct spanning a brief period of time. A RICO charge, by contrast, entails proof of multiple offenses committed in furtherance of an ongoing enterprise and occurring over an extended time span. As the court stated in *Garrett*, 471 U.S. at 788, such an offense does not "lend itself to the simple analogy of a single course of conduct." As the courts of appeals have held, *Garrett* (and not *Grady*) controls the permissibility of successive prosecutions for RICO and its predicate offenses. *E.g.*, *O'Connor*, slip op. 4-9; *Gonzalez*, 921 F.2d at 1535-1539; *Gambino*, 920 F.2d at 1112-1113; *Pungitore*, 910 F.2d at 1111.

In addition, *Grady* explicitly reaffirmed the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed—or the government had not discovered the facts necessary to prove it—at the time of the indictment in the earlier case. 495 U.S. at 516 n.7. In light of the allegations in this case of predicate acts that took place after the date of the first indictment, as well as the fact that the government did not know of some of the predicate acts committed by petitioner until after that date, there was clearly no constitutional bar to bringing a successive prosecution under the RICO statute in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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